IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4834 OF 1989

1) National Organic Chemical Industries Ltd., being a Company registered under the provisions of the Companies Act 1956, and having its registered Office at Mafatlal Centre, Nariman Point, Mumbai - 400 021.

2) Mr.N.C.Majumdar of Bombay, residing at Hansraj Wadi, Tagore Road, Santa Cruz (W), Mumbai - 400 058 ..Petitioners.

V/s.

1) Union of India

2) Superintendent of Central Excise Range III, Belapur Division, Thane having his office at CGO building, 3rd floor, New Bombay. ..Respondents.

Mr.H.C.Daruwala, Advocate i/b. M/s.Crawford Bayley & Co. for petitioners.

Mr.R.V.Desai, senior Advocate with A.S.Rao i/b. Mr.A.S. Khan for respondents.

CORAM : V.C.DAGA AND
J.P.DEVADHAR, JJ.

DATED : 26TH APRIL, 2005.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. The short point raised in this petition is, whether the demand and collection of central excise duty in the absence of any adjudication order and without issuing a show cause notice under the provisions of the Central Excise Act, 1944 can be sustained in law.

2. The facts having a bearing on the subject matter of the present petition are as follows:-

. The petitioners manufacture PVC compounds and PVC Master Batches, etc. The PVC Master Batches are predominantly PVC compounds with 7% to 10% of pigment. These PVC Master Batches are used for imparting colour to the PVC compound. Prior to May, 1979, the PVC Master Batches manufactured by the petitioners were classified as PVC compounds under TI-15A-1(ii) of the Central Excise Tariff and were cleared at Nil rate of duty under the Exemption Notification No.206/77 dated 29th June, 1977.

3. On 7th May, 1979 a show cause notice was issued to the petitioners alleging that the PVC Master Batches

manufactured by the petitioners were wrongly and incorrectly classified. On 29th September, 1980 in supersession of the above, another show cause notice was issued to the petitioners stating that the PVC Master Batches manufactured by the petitioners were correctly classifiable under TI-14(1)(ii) with the rate of duty at 5%. By the said show cause notice, the petitioners were called upon to pay excise duty under TI-14(1)(ii) in respect of the PVC Master Batches cleared during the period from November, 1978 to April, 1979. The petitioners while objecting to the classification proposed by the department filed a classification list in May, 1979 classifying Master Batches under TI-14(1)(ii) under protest and cleared the same on payment of 5% duty.

4. In reply to the show cause notice dated 29/9/1980 the petitioners submitted that the PVC Master Batches were correctly classifiable under TI 15A-1(ii) and not under TI -14(1)(ii). Rejecting the contention of the petitioners, the Assistant Collector of Central Excise passed an order in original holding that PVC Master Batches were classifiable under TI-14(1)(ii) and accordingly upheld the demand raised in the show cause notice. On an appeal filed by the petitioners, the Collector of Central Excise

(A) confirmed the order of the Assistant Collector. On further appeal filed by the petitioners, the CEGAT by its order dated 31-3-1987 held that PVC Master Batches were classifiable neither under TI-15A-1(ii) nor under TI-14 (1)(ii) but were classifiable under TI-68 of the Central Excise Tariff. The Tribunal held that the first show cause notice dated 7/5/1979 was invalid and the second show cause notice dated 29/9/1980 as amended by a letter dated 18/4/1981 though valid, the amount of excise duty claimed in the show cause notice in respect of Master Batches cleared during November, 1978 to April, 1979 is time barred because the show cause notice issued is for the period beyond six months and there is no suppression of facts on the part of the petitioners. Challenging the order of CEGAT the petitioners filed an S.L.P. before the Apex Court and the same was dismissed on 21-3-1995. Thus, the decision of the Tribunal dated 31st March, 1987 classifying PVC Master Batches under Tariff Item 68 and holding that the claim for excise duty for the clearances effected during November, 1978 to April, 1979 as time barred have attained finality.

5. In the meantime, by a letter dated 26th February, 1988, the Superintendent of Central Excise, in the light

of the decision of the Tribunal dated 31/3/1987 called upon the petitioner to pay excise duty applicable to TI-68 in respect of Master Batches cleared during the period 1st March, 1980 to 28th February, 1986 within 7 days from the receipt of the said letter. By a letter dated 3rd March, 1988 the petitioners contended that without initiating proceedings by issue of a show cause notice, the demand cannot be raised. By a letter dated 9th March, 1988 the Superintendent of Central Excise quantified the excise duty at Rs.9,60,865.07 being the differential amount of duty payable by the petitioners in respect of the clearances effected during the period from 20th April, 1979 to 28th February, 1986. In the said letter it was stated that there was no need to issue a show cause notice and that the petitioners should comply with the letter of the Superintendent dated 9th March, 1988. By a letter dated 4th April, 1988 the Superintendent, Central Excise informed the petitioners that the demand quantified in the letter dated 9/3/1988 be read as Rs.10,39.664.98 instead of Rs.9,60,865.07. By a letter dated 15th April, 1988 the Superintendent of the Central Excise threatened the petitioners with coercive action if the amount of demand was not paid within three days. However, the said letter was withdrawn by another letter of the same day i.e. 15th

April, 1988.

6. Thereafter by a letter dated 27th April, 1988 the Superintendent of Central Excise once again called upon the petitioners to pay the differential duty amounting to

Rs.10,39,664.98 within 5 days of the receipt of the said letter. The petitioners objected to the demand, however, ultimately on 16th December, 1988 the petitioners paid the said amount of Rs.10,39,664.98 under protest and without prejudice to the rights and contentions of the petitioners. Hence the present petition is filed in June, 1989 inter alia on the ground that the demand and collection of duty is without authority of law and accordingly sought refund of the said amount illegally collected by the respondents.

7. Mr.H.C.Daruwala, learned counsel for the petitioners submitted that under section 11A of the Central Excise Act, it was obligatory on the part of the department to issue a show cause notice for recovery of the excise duty allegedly not levied or not paid or short levied or short paid under the Central Excise Act. He submitted that without issuing any show cause notice,

demand could not be raised against the petitioners. He submitted that the illegal demand and the collection of the amount by coercive method is in contravention of the statutory provision and is liable to be quashed and set aside. In this connection, he relied upon the decision of the Apex Court in the case of **Gokak Patel Volkart Ltd. V/s. Collector of Central Excise, Belgaum** reported in **1987 (28) E.L.T. 53 (S.C.)**, wherein it is held that the demand notice served in contravention of the statutory requirement is liable to be quashed and set aside.

8. Mr.Daruwala further submitted that in a case where a particular classification is rescinded and a show cause notice is issued for change of classification, then such a change in classification and demand pursuant thereto has to be prospective from the date of the show cause notice. He submitted that in the present case, upto 1979 the PVC Master Batches manufactured by the petitioners were assessed at nil rate under TI-15A-1(ii). By a show cause notice dated 29/9/1980 the revenue sought to classify Master Batches under TI-14(1)(ii). The Assistant Collector as well as the Collector (A) upheld the contention of the revenue that the Master Batches were classifiable under TI-14 (1)(ii). It is only the CEGAT by

its order dated 31st March, 1987 for the first time held that the PVC Master Batches manufactured by the petitioners are classifiable under TI-68 of the Central Excise Tariff and at the same time rejected the claim for recovery of duty for the period November, 1978 to April, 1979. In the light of the decision of the Apex Court in the case of **Union of India V/s. Madhumilan Syntex Pvt. Ltd.** reported in **1988 (35) E.L.T.349 (S.C.)** and **Collector of Central Excise V/s. Giridhara Supply Co.** reported in **1997 (94) E.L.T.14 (S.C.)**, the learned counsel for the petitioners submitted that the claim of duty under TI-68 of the Central Excise Tariff for the period prior to the date of decision of the Tribunal dated 31st March, 1987 is not maintainable and in any event in the absence of show cause notice, the excise authorities were not justified in demanding and collecting the differential excise duty under TI-68 for the period from April, 1979 to February, 1986. Accordingly, the counsel for the petitioners submitted that the entire action on the part of the respondents is wholly illegal and contrary to law and, therefore, the respondents be directed to refund the illegally collected amount with interest.

9. Mr.R.V.Desai, learned senior advocate appearing on

behalf of the respondents submitted that the demand raised in the present case is only as a consequence to the order of the Tribunal dated 31st March, 1987 classifying the PVC Master Batches manufactured by the petitioners under TI-68 of the Central Excise Tariff. He submitted that once the Tribunal holds that the goods are classifiable under TI-68, there is no question of passing any quasi judicial order and on quantification of the amount found due and payable pursuant to the order of CEGAT, the petitioners are bound and liable to pay the same. He submitted that for quantifying duty as per the order of CEGAT, it is not necessary to issue a show cause notice. He submitted that once the Tribunal decides the classification, the natural consequence is that whatever the differential duty payable in view of the order passed by the CEGAT has only to be quantified and has to be paid by the petitioners.

10. In any event, Mr.Desai submitted that under the Central Excise Law, once an amount is paid as duty, refund of that amount can be allowed only in accordance with the procedure prescribed under section 11B of the Central Excise Act. Accordingly, Mr.Desai submitted that the amount of duty paid by the petitioners in accordance with the order passed by CEGAT is not liable to be refunded and

even if it is held that the petitioners are entitled to refund of that amount, then, the same can be granted only by following the procedure prescribed under section 11B of the Central Excise Act. Accordingly, Mr.Desai submitted that there is no merit in the petition and same is liable to be dismissed.

11. We have carefully considered the rival submissions. In the present case, the dispute between the parties was whether the Master Batches manufactured by the petitioners are classifiable under TI-15A-1(ii) or under TI-14(1)(ii) of the Central Excise Tariff. On adjudcition of the show cause notice dated 29th September, 1980, the Assistant Collector held that Master Batches manufactured by the petitioners were classifiable under TI-14(1)(ii). The Collector (A) upheld the adjudication order. However, contrary to the contention of the revenue, the Tribunal for the first time in its order dated 31st March, 1987 held that the Master Batches are classifiable under TI-68. It is pertinent to note that the Tribunal has rejected the claim of the Revenue under the show cause notice dated 29/9/1980 for recovery of excise duty under TI-14(1) (ii) for the period from November, 1978 to April, 1979 on the ground that the same is time barred. In other words, even

after holding that the Master Batches are classifiable under TI-68 the Tribunal held that the excise duty for the past period cannot be sustained as the same is time barred.

12. The question, therefore, to be considered in the present petition is, whether the Excise authorities were justified in demanding excise duty under TI-68 in the year 1988 in respect of the Master Batches cleared during the period from April, 1979 to February, 1986. As stated earlier, till the decision of the Tribunal on 31st March, 1987, it was not even the contention of the Revenue that Master Batches are classifiable under TI-68. Even the Tribunal in its order dated 31st March, 1987 has not held that the respondents are entitled to recover excise duty under TI-68 in respect of the past clearances. Therefore, the contention of the respondents that the demand for recovery under TI-68 for the period from April, 1979 to February, 1986 is in the light of the decision of the Tribunal dated 31st March, 1987 cannot be accepted.

13. In the present case, it is not in dispute that in May, 1979 the petitioners had filed classification list under protest classifying the Master Batches under TI-14

(1)(ii) as claimed by the revenue and since then the Master Batches have been cleared on payment of duty under TI-14(1)(ii) and that the assessment in respect of clearances effected during April, 1979 to February, 1986 have attained finality. It is well settled in law that in the absence of reopening of the completed assessment by a show cause notice within the period of limitation prescribed under the Act, no demand can be raised and if the show cause notice issued is beyond time, then the said show cause notice issued is liable to be quashed and set aside [See **Sarabai Chemicals V/s. Collector of Central Excise (2005 (2) S.C.C. 168)]**. It is also now well settled that the extended period of 5 years is not available where the classification list is duly approved by the excise authorities. We may refer to the decision of the Apex Court in the case of **Commissioner of Central Excise V/s. Dabur India Ltd. (183 E.L.T. 308 S.C.)** in that behalf. In the present case, the respondents have not even issued a show cause notice to reopen the concluded assessment by invoking the extended period of limitation. In these circumstances, the demand and collection of the amount by the Central Excise authorities in the present case cannot be sustained.

14. The contention of the respondents that since the amount is paid as duty, the refund of that amount can be granted only under section 11B of the Central Excise Act is also without any merit. As stated earlier, the petitioners have been objecting to the demand since inception. It is only because of the coercive action threatened by the respondents the amount was paid. In the present case, the question of the petitioners passing on the duty element to the customers does not arise because the goods in question were cleared during the period from 1979 to 1986 on payment of duty under TI- 14(1)(ii) as claimed by the revenue and the differential duty under TI-68 is claimed in the year 1988 and on account of persistent demand the differential duty is paid in the year 1989. In other words, in respect of goods cleared on payment of duty under TI-14(1)(ii) during 1979 to 1986, the question of the petitioners recovering duty under TI-68 from their customers in the year 1987 in the light of the decision of the Tribunal does not arise at all. Therefore, the contention of the revenue that the refund should be ordered subject to enquiry of unjust enrichment under section 11B of the Central Excise Act is also without any merit.

15. For all the aforesaid reasons, we hold that the demand and recovery of excise duty under TI-68 in respect of the clearances of Master Batches effected during 1979 to 1986 is totally improper, illegal and contrary to law. In fact, the demand and recovery of duty is in gross abuse of the process of law and high-handed. By collecting the amount unauthorisedly and illegally the respondents have deprived the petitioners their valuable right to utilise the amount belonging to them and, therefore, the respondents are liable to refund the illegally collected amount with interest.

16. Accordingly, the petition succeeds. Rule is made absolute in terms of prayer clause (a). The respondents are directed to refund the amount of Rs.10,39,664.98 to the petitioners within 12 weeks from today with interest at the rate of 6% p.a. from the date of collection of duty till payment. In case of non compliance of the above, refund will carry interest at the rate of 10% p.a. from 1/7/2005 till payment.

17. Petition is disposed of in the above terms with no order as to costs.

(V.C. DAGA, J.)

(J.P.DEVADHAR, J.)